PUBLIC PROSECUTOR

v.

TEO BOON QEER & ANOR.

HIGH COURT MALAYA, JOHOR BAHRU
MAHADEV SHANKAR J
[CRIMINAL APPEAL NO. 44 OF 1982]
29 OCTOBER 1983

CUSTOMS AND EXCISE: *Export of crude palm oil declared as sludge oil - Contradicting evidence - Duty of defence Counsel to put the case to prosecution witness - Accused's knowledge of fraudulent evasion or attempt at fraudulent evasion imperative under this charge - Customs Act 1967, ss. 101,120,135 (1) (g), (i).*

On 15 November 1979, a lorry ND 4484 T/N 680 arrived at the Export Bay, Customs Complex, Johore Bahru on its way to Singapore with a cargo of oil. The owner of the cargo was the first respondent and he made a declaration of goods stating that the cargo was 16 metric tonnes of sludge oil. The second respondent was the lorry driver. He produced a sample of oil said to be in the tanker. Before the lorry could leave, it was stopped and further samples were taken. The tests showed that they were crude palm oil. Consequently the first and second respondents were charged in the Magistrate's Court for an offence under s. 135(1) (g) Customs Act. At the trial, the defence produced evidence that more samples were taken out of the tanker, subsequent to its detention (and whilst under the custody of the Customs Department) were analysed by another Government Chemist and found to be sludge oil. The Magistrate at the end of the trial held that the defence had created a reasonable doubt as to their guilt and accordingly acquitted both the accused. The DPP thereafter appealed.

Held:

[1] On the taking of samples in relation to establishing the offence, there is no necessity to prove that the quantity of samples amounted to 10% of the total quantity (as s. 120 Customs Act 1967 may imply).

[2] Defence case should have been put to the prosecution witnesses.

[3] Knowledge of the accused as to the nature of the cargo as declared, must be proven to establish guilt under this offence.

[Appeal dismissed.]

Cases referred to:
Public Prosecutor v. Mettiarachigae L.B. Perera [1977] 1 MLJ 12
Au Ah Lin v. PP [1963] MLJ 365
PP v. Cheng Meng Bong [1966] 1 MLJ 237
R. v. Vilayuthan [1935] MLJ 277
Chua Beow Huat v. PP [1970] 2 MLJ 29
R. v. Pichimuthu [1970] 2 MLJ 143
Wong Swee Chin v. PP [1981] 1 MLJ 212
Chai Ah Sun v. PP [1954] MLJ 217
Chua Ban Han v. PP [1970] MLJ 29
Abu Bakar b. Nasir v. PP [1970] 2 MLJ 216

Legislation referred to:
Customs Act 1967, ss. 101, 120, 135(1) (g), (i).
Customs Ordinance 1952, s. 116

For the appellant - Azmi Ahmad (Deputy Public Prosecutor)
For the respondents - R.K. Menon; M/s. R.K. Menon & Co.

JUDGMENT

Mahadev Shankar J:

On the 15 November 1979 lorry ND 4484 T/N 680 arrived at the Export Bay, Customs Complex, Johore Bahru on its way to Singapore with a cargo of oil.

The cargo was owned by Soon Fong Trading Company. Its proprietor, one Teo Boon Qeer, had put up a declaration of goods to be exported in the normal customs form for that purpose. The declaration was that the oil in question in the tanker was sludge oil. The quantity was declared to be 16 metric tonnes and the value was stated to be RM259.26 per tonne.

The lorry driver was one Tiew Hock Sing. He had produced a sample of the oil said to be in the tanker to one customs officer after handing in the export declaration form. Thereafter he proceeded towards the exit gate. Before he could get through, a second party of customs officers, acting on information received, stopped the lorry and sent it back to the re-examination bay. Here the lorry was detained on suspicion. Further samples were taken of the contents of the tanker and these samples were found on analysis to be crude palm oil.

Accordingly, the owner of the cargo, Mr. Teo Boon Queer, who had filled up the export declaration form, and the lorry driver Mr. Tiew Hock Sing were charged in the Magistrate's Court at Johore Bahru for an offence under s. 135(1)(g) and punishable under s. 135(1)(i) of the Customs Act 1967.

In due course they were tried in the Magistrate's Court. Their defence was called at the close of the prosecution case.

In their defence evidence was led that some time after the date on which the cargo was seized, but whilst the tanker was still in customs custody, the Anti-Corruption Agency, in the course of its own investigation, caused samples to be taken of the contents of the same tanker. These samples were analysed by the Government chemist on behalf of the ACA and found to be sludge oil.

On the strength of this evidence and the collateral material also led by the defence, the Learned Magistrate held that the defence had created a reasonable doubt as to their guilt, and accordingly acquitted and discharged both the defendants and ordered the subject matter of the charge to be returned to them.

Against this acquittal the DPP has appealed on a variety of grounds.

When the appeal came on for hearing the 2nd respondent, namely Tiew Hock Sing, the driver of the lorry had not been served with the notice of hearing. Several attempts had been made by the Court process servers to effect service but to no avail. The Learned DPP then applied for an order that the customs officers be allowed to attempt to effect service upon the driver. An order was made to this effect and the appeal so far as the lorry driver was concerned was postponed to a date to be fixed.

The appeal against the owner of the cargo, Mr. Teo Boon Queer, proceeded.

The first ground which the Learned DPP urged was that in her judgment, the learned Magistrate had noted that even though the lorry was detained on the 15 November 1979, the accused were not charged in Court until the 12 January 1980. He cited the case of *Public*

Prosecutor v. Mettiarachigae L.B. Perera [1977] 1 MLJ 12 as authority for the proposition that the learned Magistrate should not have allowed herself to be adversely influenced by a lapse of time between the date of the offence and the date on which the accused persons were charged.

With respect to the learned DPP, a careful perusal of the grounds of decision will show that all the learned Magistrate was doing was to state that the defence had laid some emphasis on the delay in the charging of the accused. I am unable to find anything in the grounds of the learned Magistrate's decision to suggest that she drew any conclusion prejudicial to the prosecution from the mere fact that there had been a lapse of just under 2 months between the date of the offence and the date on which they were first charged. I accordingly hold that nothing turns on this point.

The second ground urged by the learned DPP went to the root of the entire case.

The lorry had arrived at the customs export section at about 11.25 a.m. on the 15 November 1979. The customs preventive officers had been waiting for it since 5 a.m. that day, acting on information received. They detained it shortly after its arrival. At about 3 p.m. the same afternoon Mr. Chan Eng Tuan of the Chemistry Department arrived at the customs complex at the invitation of the customs officers and proceeded to take samples from the tanker in the presence of the lorry driver. He found that the contents of the tanker were to be 16 thousand litres of oil. The tanker had 3 top openings. The oil was still hot and homogeneous when he first saw it. With the help of 2 workers from his department and under his supervision he took 6 samples of oil from the tanker. These samples were taken in accordance with the standard procedure given in a book written by Dr. S Ridley. After analysis he found all the 6 samples to be crude palm oil. He stated this positively and further stated that the 6 samples should never be classified as sludge oil. On the 22 December 1979 these samples were returned to the customs department in the usual manner.

He was cross-examined at great length but his evidence on the matter remained unshaken.

As against this evidence the accused in their defence also called a senior chemist from the Chemistry Department in Petaling Jaya, Mr. Lum Kon Woon.

What had happened was that after the detention of the lorries the owner of the cargo had made a report to the Anti-Corruption Agency complaining of harassment. The ACA initiated its own investigations. On the 29 December 1979 the ACA asked one Mr. Jagjeet Singh, a licenced survey of palm oil, to proceed to the Customs Complex Johore Bahru. The lorry and trailer involved in this case were there in customs custody and had been so since the seizure. Mr. Jagjeet Singh accompanied by a customs officer and officer of the ACA then broke the seals of some tankers which had been seized including the lorry charge. He proceeded to take one sample from each of the 5 lorries he was asked to examine.

Then these samples were submitted to the Chemistry Department in Kuala Lumpur. DW3, Mr. Lum Kon Woon, the senior chemist attached to the Chemistry Department Petaling Jaya, Selangor found upon analysis that the sample of oil taken from the tanker in question was not crude palm oil but was sludge oil.

This sharp conflict in the evidence of the chemist called by the defence with the evidence called by the prosecution obviously created severe problems for the learned Magistrate.

Undoubtedly the prosecution had led evidence which tended to prove that on the 15 November 1979 the lorry contained 16,000 litres of crude palm oil.

But then the effect of the evidence of the senior chemist called by the defence was that on the 29 December 1979 the proper description for this very same cargo was not crude palm oil but sludge oil.

Was it possible for crude palm oil to co-exist with sludge oil in the same tank? Was it possible for crude palm oil to become sludge oil by decomposition or some other spontaneous process? After all there was evidence that the tanker had throughout been in the custody of the customs officers and what is more the tanker tops had been sealed. If this was to be discounted was it possible that someone had replaced the cargo with sludge oil?

These possibilities were debated at some length by the defence and the prosecution in their submissions both in the Court below and on appeal. There was a great deal of discussion also, both in the Court below and on appeal, as to the proper method of taking samples.

These matters led me to invite discussion on the effect of s. 120 of the Customs Act 1967. The quantity of oil taken for sampling was not in evidence. The prosecution chemist had taken 6 samples, and the defence witness had taken one. All that was given in evidence was the method of sampling and the ratio of the quantities taken by way of sample from different levels of the fluid in the tanker. The Court was asked to draw conclusions as to 16,000 litres of fluid when there was every indication that the quantity of the sample taken was comparatively minute.

In this case it was pertinent therefore to inquire whether the sample taken for analysis for each of the chemists corresponded with the bulk.

Neither the prosecution nor Mr. R.K. Menon for the defence was able to assist me with any decided authorities on the effect of s. 120 of the Customs Act 1967. In the course of the argument on appeal, therefore, I thought that it could be legitimately contended as was done by Mr. R.K. Menon, that by failing to show the quantity of the sample taken the prosecution had not discharged the onus placed on it.

Further research has disclosed the contrary.

The effect of s. 120 of the Customs Act 1967 has already been the subject of 2 previous decisions. *Au Ah Lin v. P.P* [1963] MLJ 365 and *PP v. Cheng Meng Bong* [1966] 1 MLJ 237 are both decisions on s. 116 of the Customs Ordinance 1952. But the wording of s. 116 of the Customs Ordinance 1952 and s. 120 of the Customs Act 1967 are identical.

Accordingly I hold that it was not necessary for the prosecution to prove that the quantity of the 6 samples taken by Mr. Chang Eng Tuan amounted to 10% of the total quantity of 16,000 litres which was the subject matter of the charge.

The crux of the case therefore was whether the defence had rebutted the prosecution evidence that on the 15 November 1979 this lorry was carrying 16,000 litres of crude palm oil.

Was this onus discharged by showing that on the 29 December 1979 i.e. one month and 4 days later the cargo was undoubtedly proven to be sludge oil?

What had happened in the meantime?

As I understood the case for the defence made out by Mr. Menon in this appeal it came to this. Sludge oil remained sludge oil notwithstanding any physical changes to which the same was subjected. It did not matter whether the same was heated, agitated, or churned. Crude palm oil, on the other hand, continued to remain crude palm oil and it did not matter that the

oil was left to stagnate or cool down so as to change from a hot and homogeneous state into a cold and partially solid state. It therefore followed that proving that the oil was sludge oil on the 29 December 1979 it necessarily followed that the same oil must be sludge oil on the 15 November 1979.

This submission was the core of the defence case.

But alas, it was not put to Chan Eng Tuan when he was cross-examined.

As the record indicates he was cross-examined at great length. It was put to him that sludge oil would not suffer any chemical change when heated and turned from the solid to the liquid state or when it further cooled from liquid state to the solid state. Mr. Lum Kon Woon's name was put to Mr. Chan Eng Tuan in cross-examination and some desultory questions were put about their respective qualifications. But not one word was put to him that the hot homogenous crude palm oil found in the tanker on the 15th of November 1979 could by itself have mysteriously changed into sludge oil on the 29th of December 1979.

The result of this omission was to put a totally unfair burden upon the prosecution when their turn came to cross-examine Mr. Lum who was called for the defence.

There are numerous Malaysian authorities in existence at the present time which lay down that there is a clear burden upon defence Counsel to put their case to prosecution witnesses. Reference may be made in this context to:-

1. *R. v. Vilayuthan* [1935] MLJ 277
2. *Chua Beow Huat v. P.P* [1970] 2 MLJ 29
3. *R. v. Pichimuthu* [1970] 2 MLJ 143
4. *Wong Swee Chin v. PP* [1981] 1 MLJ 212

Unfortunately the defence in this case did not have proper access to the rebutting material which was in the hands of the Anti-Corruption Agency who had conducted the further investigations into the contents of the tanker. They had to be summoned to Court to produce evidence by the defence. There may therefore have been extenuating circumstances for the omission of the defence to put this aspect of the matter to the prosecution chemist.

Having considered the evidence by the chemist called by the defence, this Court is not satisfied that the proper interpretation to be put on Mr. Lum Kon Woon's evidence is that he was saying that the proper inference from his evidence that because the contents of the lorry were found to be sludge oil on the 29 December 1979 it followed that the same oil could be sludge oil on the 15 November 1979.

Mr. Lum was not saying that the oil on the 15 November was not crude palm oil and it follows therefore that the defence, in the opinion of this Court, had not satisfactorily rebutted the case for the prosecution. The lengthy debate in the Court below about the proper method of taking samples, physical and chemical changes, seems to have obscured the central issue in the case once the defence was called. This was whether the defence had rebutted the prosecution evidence that at the critical time on the 15 November 1979 the oil was crude palm oil and nothing else.

Everything else being equal and especially considering that the prosecution was not given a reasonable opportunity to deal with the defence contentions through Mr. Chan Eng Tuan, I would have ordered a re-trial.

But there are some other aspects of this case which it is also my duty to consider.

The charge against the accused made it imperative for the prosecution not only to prove that the cargo was crude palm oil but also to show that the accused knew that it was crude palm oil. The gravamen of the charge was that he was knowingly concerned.

No emphasis appears to have been placed by the prosecution on this aspect of the case. Some evidence could have been called to show the value for which the goods had been purchased and possibly even the price at which it was to be resold. The accused himself did not produce any receipts claiming that he had left them at home. However, I observed that he also called the person from whom he had purchased the oil as sludge oil. The Learned Magistrate had the opportunity of seeing these witnesses in the Court below and I am not prepared to hold that having considered the impact of their testimony she was not entitled to come to the conclusion that there was a reasonable doubt as to whether the accused might not genuinely have believed that the cargo of oil which he was exporting was in fact sludge oil.

In addition to this there are several other unsatisfactory features about this case which leads me to the view that it would not be consonant with the requirements of justice for this case to be remitted for a re-trial thus exposing the accused to being vexed twice for the same offence.

Once the prosecution was launched the interests of justice required that both the ACA and the DPP should have ensured that all material available was placed before the Court.

Mr. Lum Kon Woon's evidence in this case was material evidence and it is hard to see why the defence was left to struggle to have to produce it.

The only other point raised in this appeal concerns the admission of statements recorded from the appellant and the lorry driver under the provisions of s. 101 of the Customs Act. The Learned DPP submitted that these statements were inadmissible. The defence contended that they were admissible. In line with the cases of *Chai Ah Sun v. PP* [1954] MLJ 217, *Chua Ban Han v. P.P* [1970] MLJ 29 and *Abu Bakar bin Nasir* [1970] 2 MLJ 216 and although nothing turns on the point, I hold the statements to be admissible in the context of the facts of this case.

To come back to the main issue it is with some regret this Court must hold that the acquittal in the Court below should not be interfered with. The orders made by the Learned Magistrate must therefore stand.

It follows that this appeal is dismissed.

In the light of this finding the Learned DPP should consider whether the appeal against the lorry driver should not be discontinued.

Also found at [1984] 1 CLJ 123